

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:09-00137

JOSEPH CLEVELAND FERRELL
SOUTHERN AMUSEMENT CO., INC.

RESPONSE OF UNITED STATES TO
MOTION OF WEST VIRGINIA STATE LOTTERY COMMISSION
FOR A PROTECTIVE ORDER TO RELIEVE THE LOTTERY
FROM ITS OBLIGATION TO REDACT SOCIAL SECURITY NUMBERS
AND OTHER PERSONAL INFORMATION FROM
THE INFORMATION RELEASED PURSUANT TO THE
COURT ORDER OF MARCH 1, 2010

Now comes the United States of America, by Hunter P. Smith Jr. and Larry R. Ellis, Assistant United States Attorneys for the Southern District of West Virginia, in response to the Motion of West Virginia State Lottery Commission for a Protective Order to Relieve the Lottery from its Obligation to Redact Social Security Numbers and Other Personal Information from the Information Released Pursuant to the Court Order of March 1, 2010.

This response advocates solely for the interest of the United States in this case for a fair trial to be conducted without undue delay. It does not champion or particularly address any rights or interests of third parties that may be affected by the disclosures sought. The United States is without standing or authority to defend any such interest and nothing in this response should be construed as a waiver or compromise of any such interest.

The United States believes that the issue of sensitive, private personal information, raised by the West Virginia Lottery Commission in its motion for a protective order pertains almost entirely to the fourth category of information sought by the subpoena in question, namely, electronically stored documents containing any of several listed search terms. With respect to that category of information, the United States restates its position that defendants cannot meet the relevance, admissibility, and specificity requirements of United States v. Nixon, 418 U.S. 683, 699-700 (1974), and United States v. Caro, 597 F.3d 608, 619-20 (4th Cir. 2010), and can do no more than speculate about what the requested information will show. Caro at 620. For this reason, and inasmuch as the privacy interests of third parties and the interests in bringing this case to trial in a reasonable time countervail, this Court should considering modifying the subpoena by removing this fourth category of information from it.

The United States believes that defendants can meet the Nixon standards with respect to the first three categories of information and believes that the information in those three categories can be produced without unduly delaying the trial of this case.

Further, the United States recognizes that it is possible that some sensitive and private information might be disclosed in connection with emails sent to or received from Carolyn Kitchen, as requested by the subpoena. The United States would not oppose an

order of this Court directing that all such private information, including medical information, social security numbers, names of minor children, dates of birth, and financial account numbers, be protected by restricting the use and possession of any such email to counsel for the parties and not be shared with others, including defendants.

The United States believes the Court should also consider whether the delivery of the records sought by the subpoena to the Clerk of this Court implicates this Court's General Order addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files and, if necessary, enter an appropriate protective order relative thereto.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing "Motion of West Virginia State Lottery Commission for a Protective Order to Relieve the Lottery from its Obligation to Redact Social Security Numbers and Other Personal Information from the Information Released Pursuant to the Court Order of March 1, 2010" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing on this 27th day of May, 2010, to:

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